



CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

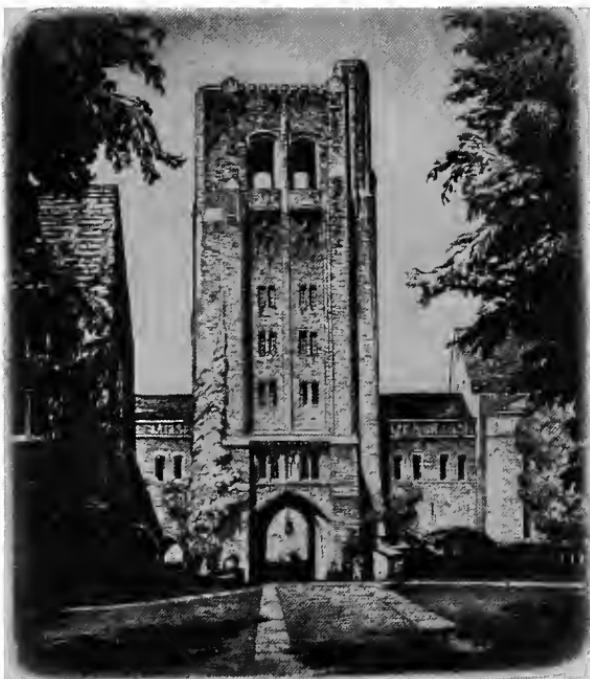
JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

CORNELL UNIVERSITY LIBRARY



Cornell Law School Library



Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

S U P P L E M E N T

TO

THOMPSON'S TREATISE

ON THE

L A W O F H I G H W A Y S .

BY

C H A S . H . M I L L S ,

OF THE ALBANY BAR.

A L B A N Y :

W. C. LITTLE & CO., LAW PUBLISHERS.

1879.

11133.

COPYRIGHT 1879.
BY W. C. LITTLE & CO.

P R E F A C E.

IN presenting to the public these chapters, supplementary to Mr. Thompson's most excellent book on "Highways," I have attempted nothing but a continuation of his treatise, believing that the work, as performed by him, is in every way reliable and thorough ; and I have followed as far as possible the order of the original, both on account of its being the natural arrangement, and also to enable the reader to connect the two as easily as might be.

During the past twelve years there has been considerable legislation upon the subject, and some important decisions have been rendered affecting both law and practice—and it is with a view of bringing these together and placing them in such a form that they may most readily be used in connection with Thompson on Highways that the chapters have been prepared.

C. H. M.

JULY 1, 1879.

THE LAW OF HIGHWAYS.

CHAPTER I.

DIFFERENT KINDS OF HIGHWAYS.

Navigable rivers.—A public pier is a part of the public highway. (*Radway v. Briggs*, 37 N. Y. R. 256; *People v. Lambier*, 5 Denio, 9; *Fowler v. Mott*, 19 Barb. 204.) But a wharf built by an individual where no highway existed is not. (*Wetmore v. Atlantic Lead Co.*, 37 Barb. 70.)

Canals.—Declared public highways. (*Robinson v. Chamberlain*, 34 N. Y. R. 389; *Conklin v. Phoenix Mills*, 62 Barb. 299.)

The State acquires a title in fee simple to the canals, and they will not revert upon the abandonment of their use for the purpose of a canal. (*Rexford et al. v. Knight*, 11 N. Y. R. 308.)

When the canal commissioners, in pursuance of the authority of the statute (1 R. S. 221, § 19), alter a public highway which interferes with the proper location, &c., of the canal, the fee simple of the portion included within the boundary lines of the canal, is in the State; but it does not acquire the title in fee simple to any of the lands outside of these boundaries. No power is given to a canal commissioner to appropriate lands for the

mere purpose of a common highway. (*Higgins v. Reynolds*, 31 N. Y. R. 151.)

Fee in Highways.—By chapter 63 of the Laws of 1873 the commissioners are authorized to allow, upon application in writing, the laying of water pipes in the highway, provided it shall not interfere with public travel, and that all earth shall be replaced, &c. Provided, further, that no such pipe shall be laid under the traveled part of such highway, except to cross the same. As to right to lay gas pipe, see *Calkins v. Bloomfield Gas Light Co.*, 1 N. Y. Sup. 541.)

A hotel proprietor cannot confer on a coach proprietor an exclusive right to occupy the street before the hotel, having no such right himself. (*Deiz v. Lamb*, 6 Robt. 537.)

Where the owner allows the public to use his land as a highway for years, he is liable if a passer by, using ordinary care, sustains an injury by falling into an excavation made by him adjacent to the traveled portion.

It was held that an alley need not be accepted by the public to be deemed a thoroughfare. (*Beck v. Carter*, 68 N. Y. R. 283.)

The street of a city or village may be used in any way which shall best promote the interest and business thereof. Where the trustees of a village authorized the erection of a soldier's monument in one of the public streets, it was held that they could do so without the consent of the owner in fee. (*Tompkins v. Hodgson*, 2 Hun, 146; *Chapman v. A. & S. R. R. Co.*, 10 Barb. 360; *Plant v. Long Island R. R. Co.*, 10 id. 26.)

The rights of a street railroad company to the use of a street for the purpose of its business is a property right,

subject to condemnation for public use and; the legislature may authorize other persons, either natural or corporate, to do a similar business in the same street, or to use the tracks of the company, whenever in their judgment the public good requires. (*Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330.)

Dedication.—Where an owner has laid out his lands into streets, filed a map and sold lots, bounding them upon the street, and the street was accepted by the commissioners, he cannot revoke the dedication by fencing in part of the street. (*Brydges v. Wyckoff*, 67 N. Y. R. 130.)

But the street must be accepted. (*Wohler v. The Buffalo & State Line R. R.*, 46 N. Y. R. 686; *Niagara Falls Susp. Bridge Co. v. Bachman*, 66 N. Y. R. 261.)

A map made by municipal authorities, the owners of the property having nothing to do with it, the map being simply as a plan for future improvements—held, that the place in question was not a street. (*Matter of the Petition of Rhinelander*, 68 N. Y. R. 105.)

C H A P T E R I I.

COMMISSIONERS.

Election of.—By Laws of 1866, chapter 30, § 3, it is provided, that there shall be chosen at the annual town meeting, one, two or three commissioners of highways.

A resolution, taken at an annual meeting, to change the number of commissioners, cannot be rescinded until the terms have expired, nor until noon. (*People v. Sandman*, 12 Hun, 165.)

Acts directing persons to administer oath of office to officers are held to be merely directory. (*Ex parte Heath*, 3 Hill, 42.)

Commissioners inspectors of plank roads and turnpikes.

Sureties to the bond of the commissioners will be liable only for defaults of duty, during term for which they were chosen, at the time the obligation was entered into, and not for those under a reappointment. (*Kingston Mutual Ins. Co. v. Clark*, 33 Barb. 196.)

One commissioner cannot authorize another to sign his name to orders, &c. (*Todd v. Todd*, N. Y. Sup. 531.)

Trustees of Villages.—Are commissioners, for certain purposes. (*Laws of 1870, tit. 3, § 1, sub. 25.*)

Acts of commissioners *de facto* are valid so far as the public is concerned. (*People v. Covert*, 1 *Hill*, 674.)

Duties.—Commissioners, in grading highways, are not bound to provide a channel for the drainage of surface water. (*Gould v. Booth*, 66 *N. Y. R.* 62.)

But this rule does not apply where the necessity for the drainage is caused by the act of the corporation itself. (*Byrnes v. The City of Cohoes*, 67 *N. Y. R.* 204.)

They are liable for an injury happening through a defective bridge. Absence of notice does not absolve them from liability. (*Bostwick v. Barlow*, 14 *Hun*, 177.)

Where a commissioner changed a sluice way and turned it on defendant's land, held, that if it destroyed his fields he might abate it as a nuisance, and could set it up as a defense against an action by the commissioner. (*Thompson v. Allen*, 7 *Lans.* 459.)

Where they have repaired a bridge to the best of their ability, they are not liable. (*Hicks v. Chaffee*, 13 *Hun*, 293.)

Water Commissioners.—Supervisors and commissioners of highways of the several towns, and the president of any incorporated village, are made water commissioners, and have charge of dams, drains, ditches and channels. (*Laws of 1871*, ch. 303, § 16.)

Fence Viewers.—The commissioners of highways elected in every town are, by virtue of their office, fence viewers of the town. (*See Thompson on Highways*, page 95; also, *see Laws of 1871*, ch. 635; 1 *R.*

S., 354, 356 ; 1 *R. S.* 355, *as am.* ; *Laws of 1866*, 540 ; *id.*, 1838, *ch.* 261 ; 1 *R. S.* 697, 699.)

Bridge reported unsafe. — Whenever complaint in writing on oath shall be made to a commissioner of highways of any town, in which shall be in whole or in part any toll bridge, belonging to any person or corporation, representing that such toll bridge has from any cause become, and is unsafe for the public use, it shall be the duty of such highway commissioner forthwith to make a careful and thorough examination of such toll bridge so complained of, and if, upon such examination of such bridge, the said highway commissioner shall be of opinion that the same has from any cause become dangerous or unsafe for public use, he shall thereupon give immediate notice to the owner or owners of such toll bridge, or to any agent of such owner or owners, acting as such agent in respect to said bridge, that he has, on complaint made, carefully and thoroughly examined such bridge, and found it to be unsafe for the public use. It shall thereupon be the duty of such owner or owners of such bridge, immediately to commence repairing the same within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair such bridge, so as to make the same, in all respects, safe and convenient for public use ; and for neglect to take prompt and effective measures so to repair such bridge, the person or corporation owning such bridge shall forfeit twenty-five dollars, for the benefit of the town in which the highway commissioner making such examination and giving such notice shall reside, to be sued for and recovered by such highway commissioner, and expended for the improvement of highways of said town ; and after

the expiration of the time for such repairs and failure to make the same, it shall be unlawful for such bridge owner or owners, to demand or receive any toll for using said bridge until the same shall be fully repaired.

§ 2. In case of the neglect of the owner or owners of such toll bridge for one week to take such measures as by the first section of this act are required, to repair such bridge, so as to make the same safe and convenient for public use, it shall without further proceedings or notice be the duty of such highway commissioner to proceed at once to procure all necessary materials, of good and suitable quality, and to secure the requisite skilled workmen, for the needful repairs of such toll bridge, keeping or causing to be kept a just and true account of the expenses of procuring the said material and labor, and the repair thereof, so as to make it safe and convenient for public use. Such account, or a copy thereof, of the cost of such material and labor at said toll bridge and the repair thereof, duly verified by such highway commissioner, shall be paid on demand by such bridge owner or owners, together with two dollars per day for the services of such highway commissioner, for each day during which he shall have been engaged in the examination and repair of such toll bridge, the purchase of material and labor, and keeping and rendering to such bridge owner or owners such account.

§ 3. In case of the neglect or refusal of such bridge owner or owners to pay such account on presentation and demand, it shall be the duty of said highway commissioners to sue for and recover the same, in any court having jurisdiction of such action; such recovery to be for the benefit of his town, and to pay said account for material, labor and commissioner's fees, which are hereby made a charge upon such town. (*Laws 1873, ch. 448.*)

Liability of Towns.—Towns are not chargeable for the official acts or delinquencies of its commissioners or overseers of highways. (*People v. Van Keuren, N. Y. Ct. of Appeals, Sept. 17, 1878.*)

A town, in its corporate capacity, has no control over highways, and is under no legal obligation to keep the highways and bridges in repair, and hence no recovery can be had against it for injuries received by reason of the neglect of its officers to keep them in a safe condition. (*People ex rel. v. Town Auditors of Little Valley, Ct. of Appeals, Nov. 26, 1878.*)

Where a railroad, as a condition of laying its track, had agreed with the city to keep the street in and about the rails in repair, held, that where an individual, with the consent of the city authorities, made an excavation by reason of which plaintiff was injured, that the railroad company was liable. (*McMahon v. Second Ave. R. R. Co., N. Y. Ct. of Appeals, Nov. 12, 1878.*)

A city is charged with the duty of the preservation and repair of its streets, and is liable for injuries caused by defect in the same, after notice, actual, or presumed through long standing of the defect. (*Requa v. City of Rochester, 45 N. Y. R. 129.*)

A railroad company carrying a highway over the track, is bound to keep the approaches thereto in suitable repair. (*The People v. N. Y. C. & H. R. R. R., N. Y. Ct. of Appeals, Sept. 17, 1878.*)

Formation of new Road Districts.—Whenever the owners of real estate, lying along the line of any plank

or turnpike road, representing two-thirds of the frontage on such road for a distance of not less than one mile continuously, and not included within the limits of any incorporated city or village, shall apply in writing to the county court of the county in which such road shall be situated, and shall present to such court the assent, in writing, to such application of the directors of such plank or turnpike road company, and of the supervisor and commissioners of highways of town or towns in which such road is situated, the said court, at any regular session thereof, may constitute that portion of such road, described in the said application, a separate road district, to be exempt from the jurisdiction of the commissioner of highways of the town or towns in which such district shall be situated.

The court shall appoint three commissioners, &c. No toll is to be exacted. (*Laws of 1876, ch. 373.*)

The provisions of this act shall not apply to any road whose charter term remaining unexpired, shall exceed five years. (*Id. § 11.*)

The supervisors may authorize the consolidation of two or more road districts, and form a separate road district, and provide for the election or appointment of overseers of highways. (*Laws of 1875, ch. 482, § 8.*)

Raising Money for Repairs of Bridges.—The supervisors may authorize any town or towns liable for the erection, care, repair and maintenance, in whole or in part, of any bridge (except in the cases specified in the last three subdivisions), to borrow such sums of money, in the manner provided in subdivision twenty-nine of this section, as may be necessary for the purposes of such erection, care, repair and mainten-

ance, and to pay any existing debt, incurred in good faith by, or in behalf of, such town or towns for such purpose before the passage of this act. But no authority shall be exercised under this subdivision, except upon the application of the town or towns liable to be taxed for such purpose, to be made by a vote of a majority of the electors thereof, voting at a regular town meeting, or at a special town meeting called for the purpose, or upon the application of the supervisor, by and with the advice and consent of the commissioner of highways, town clerk and justices of the peace of such town or towns respectively. If any town, at a regular town meeting, held between the first day of February, 1875, and the passage of this act, shall have elected commissioners for the purpose of building a bridge and providing money to pay for the same by the issuing of bonds or otherwise, such bonds, not exceeding the amount authorized at such town meeting, are hereby authorized and declared valid ; but such bonds shall not be sold or otherwise disposed of for less than par. And the board of supervisors shall levy a tax on such town for the payment of such indebtedness, at such times and in such amounts as may be necessary to meet the obligations incurred by said commissioners in pursuance of instructions given by such town at the time of electing said commissioners. (*Laws of 1875, ch. 482, sub. 6.*)

By Laws of 1878, ch. 377, as amended by Laws of 1879, ch. 67, all moneys raised and collected upon the taxable property of any of the towns of this State, for highway and bridge purposes, shall be paid over by town collectors of taxes to the commissioners of highways of the towns in which said moneys are so raised

and collected, and to no other officer or person whatsoever. It shall be the duty of the board of supervisors to issue warrants to the collectors of towns requiring the paying over by them of all moneys raised and collected for highway and bridge purposes, to the commissioners of highways of towns ; and it shall not be lawful for the board of supervisors of any county to issue warrants to town collectors directing them to pay over any moneys raised and collected upon any town for highway and bridge purposes, to the village authorities of any incorporated village, situated wholly or partly in any town. But nothing in this act shall prevent boards of supervisors from raising money under section two of chapter eight hundred and fifty-five of the Laws of eighteen hundred and sixty-nine and from issuing warrants to collect the necessary money to repay the same. And said boards of supervisors may appoint a commissioner or commissioners to spend and account for any moneys raised for road or bridge purposes under said chapter eight hundred and fifty-five of the Laws of eighteen hundred and sixty-nine, under such regulations as said boards shall deem proper.

It shall be the duty of the commissioners of highways in the several towns in this State to expend all moneys raised and collected in any town and paid over to such commissioners of highways, upon the highways and bridges, situated in the town in which such moneys are raised and collected, and not elsewhere, in such proportions as they may deem just and proper. (§ 2.)

This act shall not apply to incorporated villages constituting a separate road district, or to special road districts of this State, now provided for by any special act. (§ 3.)

Changing System of working Highways.—It is provided by the Laws of 1873, ch. 395, as amended by Laws of 1875, ch. 341, for such towns as may wish to change the present system of working and repairing the highways, that it shall be lawful to raise by tax, to be levied and collected the same as any other tax, for the repair of its highways, an annual sum of money, which shall be at least equivalent to the value of the days' work theretofore assessed, at the commutation prices.

The form of ballots is described in the act and the commissioners of highways are to constitute a board to be known as “the board of highway commissioners for the town of ____.” One of their number is to be elected president, and is to receive money collected for highway purposes, but he must give a bond to be approved by the supervisor.

By Laws of 1879, chapter 31, any town in this State, which has changed the manner of working and repairing the highways therein, from the system provided for in article second and article third of chapter sixteen, title one, part one of the Revised Statutes, to the system provided for in chapter three hundred and ninety-five of the Laws of eighteen hundred and seventy-three, may return to the system provided for in said article two and article three of chapter sixteen, title one, part one of the Revised Statutes by complying with the provisions of this act.

§ 2. Upon the written application of twenty tax-payers of any such town, it shall be the duty of the justices or other officers who preside at the town election of any such town, to submit to the electors, and the electors of any such town may vote at the next annual town meeting upon the question of returning to the said former system of working and repairing the highways ; such

vote shall be by ballot, upon which shall be written or printed respectively, "for returning to the system of working and repairing the highways provided for in article second and article third of chapter sixteen, title one, part one of the Revised Statutes," and "against returning to the system of working and repairing the highways provided for in article second and article third of chapter sixteen, title one, part one of the Revised Statutes." The ballots shall be deposited in a separate box by themselves, be counted by the inspectors of election, or other officers presiding at such town election, and if a majority of the electors shall vote in favor of returning to said former mode, the town voting therefor may avail itself of the privileges of this act, and of said article second and article third of chapter sixteen, title one, part one of the Revised Statutes, upon causing a minute of its action to be entered by the town clerk in the town records.

By the Laws of 1874, chapter 260, § 1, the boards of supervisors of each county in this State, except New York and Kings, shall have power at their annual meeting, or at any other regular meeting, to authorize the supervisor of any town in said county, by and with the consent of the commissioner or commissioners of highways, town clerk and justices of the peace of such town, to borrow such money, for and on the credit of each town, not exceeding, however, in any year the amount of one-half of one per cent on the assessed valuation of the taxable property of the town for such year, as the said town officers may deem necessary to build or repair any road or roads, bridge or bridges in such town, or which shall be partly in such town and partly in an adjoining town, or to pay any existing debt incurred in

good faith by or on behalf of such town for such purpose, before the passage of this act; and the said board of supervisors shall have power to prescribe the form of obligation to be issued on any such loan and the time and place of payment; the time not to exceed ten years from the date of such obligation, and the rate of interest thereon not exceeding seven per cent per annum.

And the said board of supervisors shall have power and it shall be their duty from time to time, as the said obligations shall become due and payable, to impose upon the taxable property of such town sufficient tax to pay the said principal and interest of such obligations according to the terms and conditions thereof. The town officers hereinbefore mentioned shall meet at the town clerk's office, in the town for which they are elected or appointed, on the first Monday of September in each year, at ten o'clock in the morning, to determine what amount, if any, shall be borrowed on the credit of such town, for the purposes contained in the first section of the act hereby amended, and for what roads or bridges such amount shall be borrowed or appropriated; and such meeting may be adjourned from time to time, either for want of a quorum or in default of any final determination of any question arising concerning such appropriation; but no such meeting shall be held subsequent to the first Monday of October in each year.

It is not essential that the town officers named, should meet for the purpose of determining the amount to be borrowed, on the first Monday of September — the provision is merely directory. (*People ex rel. v. Tompkins*, 64 N. Y. R. 53.)

The bonds authorized by this act are to be indorsed with the town clerk's certificate and are to be disposed

of by the supervisors. The boards of supervisors, except in cities whose boundaries are the same as those of the county, are empowered to authorize any town or towns liable for the erection, care, repair and maintenance, in whole or in part, of any bridge (except in certain cases specified in the act) to borrow such sums of money as are necessary for those purposes. But no authority is to be exercised for this purpose, except upon the application of the town or towns liable to be taxed therefor, to be made by vote of a majority of the electors thereof voting, at a regular town meeting, or at a special town meeting called for the purpose, or upon the application of the supervisor, by and with the consent of the commissioner of highways, town clerk and justices of the peace of such town or towns, respectively. (*Laws of 1875, ch. 482, as amended by Laws 1876 ch. 257.*)

By the same act, such boards of supervisors, are empowered to authorize any town to issue its bonds and borrow money thereon, for a term not exceeding twenty years, for the purposes last above specified, and for the purchase of any plank, macadamized or turnpike road, or any toll bridge.

The supervisors have power, under the act of 1875, ch. 482, § 1, subd. 12, upon the application of the owners representing a majority in value (as shall be ascertained from the last annual town assessment roll) of the real estate lying along the line of any highway laid out through unimproved lands, to appropriate the non-resident highway tax on the lands lying along said line, for the improvement of such highway under the direction of a commissioner or commissioners to be appointed by the board of supervisors. But this provision does not apply to or interfere with any case where the same

object is provided for by any special law passed prior to January 1, 1875.

In case the road or bridges are wholly or partly within the limits of any incorporated village, the consent of a majority of the trustees of the village, is necessary for the action of the supervisors in raising money for building or repairing, in addition to the consent of the commissioners, town clerk, and justices of the peace. (*Laws 1873, ch. 323.*)

Special commissioners have an implied authority to do all the several acts and duties connected with their position. (*Odell v. De Witt*, 53 N. Y. R. 643.)

Commissioner has no general authority to borrow money. (*Van Alstyne v. Freday*, 41 N. Y. R. 174.)

Appointment of Overseers.—By Chap. 791 of the Laws of 1868, it is provided that the appointment of overseers of highways, be made by commissioner of highways, and overseers are not required to file acceptance of office.

Actions by or against.—A court of equity has no right to inquire into the proceedings of commissioner with a view to set them aside if void at law. (*Thatcher v. Dusenbury*, 9 How. 32.)

Against Successor.—The successor to a commissioner is not liable for the latter's neglect to repair a bridge. (*Lamonte v. Haight*, 44 How. 1.)

Abatement, etc.—A justice of the peace has no power to compel the substitution of new parties in a suit before him. (*Colegrove v. Breed*, 2 Denio 125.)

Judgment, how collected.—A judgment recovered

against commissioner of highways for injuries resulting from his neglect to keep the highway in repair, cannot be made a town charge under 1 R. S., 357,8 §8. (*People ex. rel. v. Town Auditor, Esopus, N. Y. Ct. of Appeals, Sept. 17, 1878.*)

Overseer.—An overseer can take material from the side of the highway, for repairs. (*Anderson v. Van Tassel, 53 N. Y. 631.*)

An overseer of highway, sued for trespass committed by direction of the commissioner of highways, no notice of the suit having been given to the town or its officers, the town is not liable to the relator for the expenses incurred by him in the litigation. (*People ex. rel. Van Keuren v. Town Auditor of Esopus, N. Y. Ct. of Appeals, Sept. 17, 1878.*)

An overseer has no right to turn a stream to relieve his own property, and thereby injure others. (*Kellogg v. Thompson, 66 N. Y. R. 88 ; Moran v. McCleams, 63 Barb. 185.*)

Assessment of Highway Labor.—The omission of an overseer of highways, to deliver to the town clerk a list of the inhabitants in his road district liable to work on the highways is merely directory and does not avoid the assessment. (*Rinehart v. Young, 2 Lansing, 354.*)

Members of the state militia during any period of seven years between April 17, 1854, and April 29, 1865, and who were, after serving seven years, honorably discharged shall forever after be exempt from highway taxes, not exceeding six days in each year. (*Laws 1871, ch. 245.*)

The property of railroad companies should be assessed

at its value as used, and not as farming lands. (*People v. Fredericks*, 48 Barb. 173.)

Every person liable to do highway labor, living or owning property on the line of any plank road of this state, may, on making application in writing to the commissioner or commissioners of their respective towns, on or any day previous to the time of making the highway warrants by such commissioners, be assessed the apportionment of highway labor for such property upon such plank road ; and the commissioner or commissioners, *may in their discretion*, assess such person for the land or property owned by him in or upon the line of said plank road, as a separate road district. (*Laws of 1872, chap. 128, amending laws of 1855, and 1853.*)

Additional Labor to remove Snow.—By chap. 593 of laws of 1869, the overseer's may assess and call out persons to work when highways are obstructed by snow or otherwise, when the labor has been worked out, and such labor so called for shall be assessed upon those liable to perform the same in proportion to their original assessments, if the persons so called fail to come, or to commute at a dollar a day, they shall be liable to a fine of one dollar and a half for each day.

If the overseer fails, after receiving a written notice to have the highways opened, he is subject to a fine of five dollars for each day's neglect.

NON RESIDENT TAXES.

SECTION 1. In any case where, by any act or acts of the legislature of this State, any non-resident highway taxes have been specially set apart or appropriated for the construction or maintenance of any roads or bridges,

and any commissioner or commissioners appointed therefor, and where by reason of the expiration of the official life of the commissioner or commissioners so appointed to receive, expend and account for said non-resident highway taxes, any balance or remainder so set apart or appropriated has not been so received or expended, it shall be lawful for the boards of supervisors of the counties wherein said non-resident lands are situated to appoint a commissioner or commissioners to receive and expend any such unexpended balance, under the same regulations and conditions for the faithful performance of his or their duties as were provided for in said original act or acts; and any act or acts of any board of supervisors appointing such commissioner or commissioners in anticipation of the passage of this act are hereby ratified and confirmed. (*Laws of 1879, ch. 275.*)

Villages.— In all cases where there is an incorporated village or city within the limits of any town, which is by law a separate road district, and there shall be any real estate owned by any person or corporation, situated partly within the limits of such village or city, and partly without said village or city, it shall be the duty of the assessors of such town, after fixing the valuation of the whole of such real estate as now by law required, to determine what proportion of such valuation is on account of that part of said real estate, lying without the limits of said city or village, and designate the same upon their assessment list. (*Laws of 1871, ch. 171, § 1.*)

The valuation of the real estate lying without the limits of any city or village, so fixed and determined by the assessor, shall be the valuation on which the commissioner of highways of towns shall assess highway labor, against the owner or owners of such real

estate ; and in no case shall the commissioners of highways assess any highway labor on property situated within the limits of any incorporated city or village which is by law a separate road district. (*Id.*, §2.)

Roads in Villages.—A village constitutes a separate highway district, and the trustees have power of highway commissioners. (*Laws* 1871, ch. 870 §3.)

Section 4 of Laws of 1853, ch. 626, §1, as amended 1855, ch. 495 and 1871, ch. 171, applies only to real property. (*People v. Hall*, 15 *How. Pr. Rep.* 76.)

Exempt Lands.—By Laws 1869, ch. 708, cemetery lands and property of any association formed under the act of 1847, are exempt from taxation and sale on execution — and no road may be laid through the same, without the consent of the trustees of such cemetery — except by special permission of the Legislature.

CHAPTER III.

PERFORMANCE OF HIGHWAY LABOR.

It shall be the duty of overseers of highways to give at least twenty-four hours' notice to all persons assessed to work on the highways and residing within the limits of their respective districts, of the time and place where they are to appear for that purpose, and with what implements, and also that they will be allowed for work at the rate of eight hours per day for all the hours for which they may work on the highways, between the hour of seven o'clock in the forenoon, and six o'clock in the afternoon. The highway tax upon any land or property shall be worked out or commuted for in the district in which said land or property is situated, and if commuted for, the money shall be paid to the overseer of said district for the benefit of the roads and bridges in said district; but this act shall not apply to or affect any county, city, village, town or district where the disposition of the highway tax has been provided for by special enactment. (1 R. S. 509, §32 as amended by *Laws of 1876, ch. 348.*)

Corporations may commute.— Whenever any railroad corporation assessed in any town or road district for highway labor shall elect to commute therefor, as provided by law, such corporation shall pay the commutation money to the commissioner or commissioners of highways of such town, and such moneys shall be applied and expended in the improvement of the roads

and building and maintenance of bridges in such town.
(*Laws 1877, ch. 344 as amended Laws 1878 ch. 44.*)

Proceedings to collect Non Resident Labor unpaid.—Every overseer of highways shall, on or before the first day of October in each year, make out and deliver to the supervisor of his town a list of all resident land holders residing in his district who have not worked out their highway assessment or commuted for the same, with the number of days not worked or commuted for by each resident of his district, charging for each day in such list at the rate of one dollar and fifty cents per day ; and also a list of all the lands of non residents and of persons unknown, which are assessed on his warrant by the commissioner of highways, or added to him according to law, on which the labor assessed has not been performed or commuted for, and the number of day's labor unpaid by each, charging for the same at one dollar and fifty cents per day ; which list shall be accompanied by the affidavit of the overseer, duly certified, that he has given the notice required by the thirty-second, thirty-third and thirty-fourth sections of this title, and that the labor for which such residents and such land is returned has not been performed or commuted. (1 R. S. 511 § 47, as amended 1870, ch. 461.)

It shall be the duty of each board of supervisors, at their annual meeting in each year, to cause the amount of such arrearages for highway labor returned to them severally, as provided in the preceding section, estimating each day's labor at one dollar and fifty cents a day, to be levied on the lands of all residents and non residents, returned as aforesaid, as returned by the assessors of the several towns, and to be collected in the same manner that the contingent charges of the county are

levied and collected, and to order the same, when collected, to be paid over to the commissioners of highways of towns, respectively, to be by them applied to the construction, repair and improvement of the roads and bridges in the district in which the labor was originally assessed. (*Id.*, §50, as amended 1870, ch. 461.)

Abatement of Taxes for Shade Trees.— 1. Any inhabitant, liable to highway tax, who shall transplant by the side of the public highway any forest shade trees, or fruit trees, of suitable size shall be allowed by the overseer of highways, in abatement of his highway tax, one dollar for every four trees set out ; but no row of elms shall be placed nearer than seventy feet ; no row of maples or other forest trees nearer than fifty feet, except locust, which may be set thirty feet apart ; fruit trees must also be set at least fifty feet apart ; and no allowance, as before mentioned, shall be made, unless such trees shall have been set out the year previous to the demand for said abatement of tax, and are living and well protected from animals at the time of such demand.

§2. Any trees transplanted by the side of the public highways, as aforesaid, in the place of trees which have died, shall be allowed for in the same manner and in the same conditions as in the preceding section.

§3. No person shall be allowed an abatement of his highway taxes, as aforesaid, more than one-quarter of his annual highway tax, and no one shall receive any abatement of tax for trees transplanted previous to the passage of this act. (*Laws of 1869, chap. 322, as amended by laws 1870, chap. 595.*)

Watering Trough.— By the Laws of 1872, chap. 274, the commissioners of highways in the several towns of

this state shall annually abate three dollars from the highway tax of any inhabitant of a road district, who shall construct on his own land, and keep in repair, a watering trough beside the public highway, well supplied with fresh water, the surface of which shall be two or more feet above the level of the ground, and easily accessible for horses with vehicles; but the said commissioners of highways respectively may designate the number necessary for the public convenience in each district, and no others than those designated shall be allowed this abatement of tax.

Section second directs that the directors of plank roads and turnpikes shall abate three dollars toll, from any one not an inn keeper who shall keep up a trough as above set forth.

Section three, makes it the duty of the commissioners in case of refusal by the directors to direct them to abate said amount of toll, under a penalty of twenty dollars.

Removing Fences to prevent Drifting.—By laws of 1875, chap. 196, any inhabitant liable to highway tax who shall remove from lands owned or occupied by him, the fence along any public highway for the purpose of preventing the drifting of snow into such highway, shall be allowed by the overseer of highways, in abatement of his highway tax, the time actually expended in removing such fence and in replacing the same; provided, however, that no allowance shall be made as hereinbefore provided, unless such fence shall have been removed pursuant to the direction of the overseer of highways.

Laying out Highways.—An application to establish

an old road as a public highway is not authorized by the statute. (*Christy v. Newton*, 60 *Barb.* 332.)

A petition for the laying out of a public highway may lawfully include a portion of a highway already in existence. It is a question of discretion and convenience to be determined by the commissioners or referees. (*The People v. Commissioners of Melton*, 37 *N. Y. R.* 360.)

Survey.—The survey should be incorporated in the order ; but if it is attached to it that is sufficient. All the commissioners must sign the order. (*Van Bergen v. Bradley*, 36 *N. Y. R.* 316 ; *Pratt v. People*, 13 *Hun*, 664 ; *Williams v. People*, 36 *N. Y. R.* 443.)

Irregularity in laying out of road, since December 31, 1805, and before April 14, 1826, is cured, provided, the commissioner causes a survey to be filed and recorded in the town clerk's office of the town. (*Parker v. Van Houten*, 7 *Wend.* 145.)

By the Laws of 1875, chapter 482, section 11, the supervisors have power to authorize and direct the highway commissioner or commissioners of any town to cause survey to be made, at the cost of the town, of any or all highways in such town, and to make a complete and systematic record thereof, or to revise, collate and re-arrange existing records of highways and to collect and verify the same by new surveys, and to establish the location of highways by suitable monuments whenever such commissioner or commissioners may deem it expedient. Such records, so made or revised, corrected and verified, shall be deposited with the town clerk of such town and shall thereafter be the lawful records of the highways which they describe, but shall not affect rights pending in any judicial proceedings commenced

prior to the deposit with the town clerk of such new or revised records.

Section 57 of article 4 of title 1 of chapter 16 of part 1, of Revised Statutes, in regard to laying out a road through orchard, etc., is amended by Laws of 1873, chapter 773, to read :

Unless the commissioners of highways shall, on application duly made, after five days' notice to the owner, or if he be a non-resident of the town, to the occupant of said premises, certify to the county judge that the public interest will be greatly promoted by the laying out and opening of such road, the commissioners shall serve on the owner, or if he be a non-resident of said town, on the occupant of said land, a notice of five days, to appear before the county judge to attend the hearing of said matter ; if the county judge shall affirm the decision of said commissioners they shall present the order of the county judge for confirmation to the supreme court, at a general term, in the judicial department in which said premises are situated, upon the usual notice of motion in said court, to the owner, or if he be a non-resident of the town, to the occupant of the premises ; if said court shall confirm the said order it shall then be the duty of the commissioners to proceed and lay out and open said road, as in other cases.

Garden.—It is not sufficient that the land is inclosed with a garden, but it must be a part of a *cultivated* garden, and must have been cultivated four years. (*People v. Comrs. of Greenburgh*, 57 N. Y. R., 549 ; *People ex rel. v. Lucien Horton*, 8 Hun, 357.)

Vineyard.—Private lands on which grape vineyards have been planted and have had one or more years'

growth, shall not be taken for public highways or private roads, except with the consent of the owner or owners thereof.

This act shall only apply to lands used in good faith for vineyard purposes, and shall not apply to lands within the corporate limits of any city or village, nor to any lands on which a vineyard shall hereafter be planted, after an application for the opening of a road therein shall have been made. (*Laws* 1869, ch. 24.)

Graveyard.—No private or public road shall be laid out or constructed upon or through any graveyard or burying ground in this State, unless the remains therein contained are first carefully removed and properly reinterred in some other burying ground, at the expense of the persons desiring such road. (*Laws of 1868*, ch. 843.)

Bond on application to lay out Highway.—As to the right of a commissioner to require applicant to give bond, see *Ham v. Silver nail*, 7 *Hun*, 33.

Notice of Application.—A recital in the order that there was a notice of three days is not proof of the fact. (*People v. Comrs. of North Hempstead*, 7 *Hun*, 17.)

The fact that the road passed through improved lands other than those mentioned as such in the application, does not make the proceeding void. (*Snyder v. Trumpbour*, 38 *N. Y. R.* 355.)

Freeholder's Certificate.—Omitting to file the petition at the time of making the order laying out a road, does not affect the proceeding. (*Comrs. v. Meserole*, 10 *Wend.* 122.)

Also, held in this case, that a justice of the peace has no authority to administer the oath to petitioners for a road.

Proceedings on laying out Highway. — In all cases of the alteration of any road, or the laying out of any new road, except where the same is altered, opened or laid out with the consent in writing of the owner or owners of the land to be taken for such alteration or opening, the person or persons applying for the same shall serve a notice on the town clerk of the town, and on a justice of the peace and the commissioner or commissioners of highways thereof, asking for a jury to certify to the necessity of the same, and specifying a time not less than ten or more than twenty days from the time of serving such notice, when such jury will be drawn at the clerk's office of the town by the town clerk thereof, and shall notify in writing each of the owners or occupants through which such alteration of new road is proposed to be laid, of the time and place of drawing such jury, by personally serving such notice on such owner or occupant at least five days before the drawing of such jury, or by mailing a copy thereof at least eight days before such drawing to such owner or owners, in the manner prescribed by law for the service of legal notices. At the time and place mentioned the town clerk of such town, having received such notice that such jury is to be drawn, shall, in the presence of a justice of the peace or one of the commissioners of highways of the town, deposit in a box the names of all persons then residents of his town whose names are on the lists filed in said town clerk's office, of those selected and returned as jurors, pursuant to article second, title four, chapter seven, part third of the revised statutes,

who are not interested in the lands through which such road is to pass or be located, nor of kin to the owner thereof, and shall publicly, in the presence of such justice of the peace or commissioner, draw therefrom the names of twelve persons, and shall make a certificate of such names and the purposes for which they were drawn, and shall deliver the same to the person asking for the jury, and the applicant for such jury shall pay to the said town clerk one dollar for drawing such jury. The applicant for such road or alteration of a road, on receiving such certificate, shall deliver the same to a justice of the peace of the town wherein the road is to be laid, and it shall be the duty of such justice forthwith to issue a summons to one of the constables of said town directing him to summon the persons named in said certificate, specifying a time and place in said summons, at which the persons to be summoned shall meet, which shall not be less than ten nor more than twenty days from the issuing thereof ; and in case the owner or owners of any lands through which said road or alteration is proposed to be located shall be a non-resident it shall be the duty of such justice to notify such owner or owners by mail, at least eight days before the meeting of such jury, of the time and place of such meeting, and if any person so summoned to attend as a juror, shall neglect or refuse to attend at the time and place designated in such summons, the person or persons so neglecting or refusing to attend shall be liable, unless a sufficient excuse be established, to pay a fine of five dollars, which shall be sued for and recovered by the overseers of the poor of said town, and such fine shall be applied by them to the support of the poor thereof. If nine or more of the persons, who shall have been so drawn, not interested in the lands

through which the road is to be laid, nor of kin to the owners thereof, shall appear at the time and place specified in the summons, they shall then be sworn by the justice of the peace who issued such summons well and truly to certify as to the necessity of the highway applied for, and if such justice of the peace shall refuse or neglect to attend at the time and place mentioned in said summons, such oath may be administered to such juror by any other justice of the peace of said county ; and the justice of the peace swearing such jury shall receive therefor from such applicant the sum of two dollars. Such jury shall there personally examine the route of such highway, and shall hear any reasons that may be offered for or against such proposed route or alteration. If nine or more of the number thereof shall be of opinion that such highway or alteration of a highway is necessary and proper, they shall make and subscribe a certificate in writing to that effect, which shall be delivered to the commissioners of highways of the town. But if such number thereof shall not certify that such road or alteration is necessary then no application for such road or alteration shall be made again in three months. Every juror shall be entitled to receive for his service as such juror the sum of one dollar and fifty cents, to be paid by such applicant, and the constable who may summon such jury shall receive therefor, from such applicant therefor, ten cents for summoning each juror summoned, and ten cents a mile for each mile actually and necessarily traveled in summoning such jury, in going from and returning to his place of residence therefor. If nine or more of such jurors shall make a certificate that such highway or alteration is necessary and proper, then the cost of such proceeding as hereinbefore provided, shall be a

charge against such town in favor of such applicant. The commissioners of highways shall decide upon such application for such road or alteration within thirty days after the decision of the jury, by an order in writing, which shall be filed in the office of the town clerk of such town.

§2. This act shall not affect any proceedings in relation to the laying out of any highway instituted under chapter two hundred and seventy-one, of the laws of eighteen hundred and seventy-six, nor any proceedings of appeal therein. (1 *R. S.*, 514 §60, *as amended by laws of 1877, ch. 465.*)

A justice of the peace is not required to charge the jury, in an action tried before him. (*People v. Eldredge, 3 Hun, 541.*)

Highway laid out across Railroad Tracks.—Highway commissioners cannot prevent construction of R. R. over highways, if the court has given authority. (*Baxter v. S. S. R. R. Co., 11 Abb., N. S., 178.*)

The determination of the question as to the expediency of carrying the highway over or under the track is left to the railroad company. (*New York Central v. People, 12 Hun, 195, as modified and aff'd., Sept. 17, 1878, by Ct. of Appeals.*)

The railroad has the right to determine where the crossing shall be made. (*Wademan v. A. & S. R. R., 51 N. Y. R. 568.*)

The term "track," in §1, chap. 62, Laws 1853, does not include grounds upon which tracks are laid for storing cars, or exclusively for making up trains. (*Boston and A. R. R. Co. v. Vil. of Greenbush, 52 N. Y. R. 510.*)

Between different Towns etc.—§1. Whenever a high-

way, street or road shall be on the line between a city town or village, or between either of them, the officers authorized and required to repair and keep in order the highways, streets and roads in such city, town, and village, shall meet together at the mayor's office in such city, if said highway, street or road be on the line between a city and town, or a city and village, or at the office of the town clerk of such town, if the same be on the line between a town and village, on the first Monday of May in each year, at twelve o'clock m., and divide such highway, street or road, and allot one part thereof to such city, and the other to such town or village, or one part thereof to such town and the other to such village, as the case may be, in such a manner that the labor and expense of working and keeping in repair such highway, street or road may be equal as near as may be.

§2. Upon the neglect or failure to attend on the part of the officers of any city, town or village, at the time or places designated in the first section of this act for the purposes therein mentioned, the officers of the city, town or village present may perform the said duty, and when done, the divisions thus made shall be of the same force and effect as if made by the joint action of such city and town, or such city and village, or such town and village.

§3. The statement of the division made pursuant to the provisions of the first or second section of this act, shall be reduced to writing and properly authenticated by the officers making the same, and shall be filed within ten days after such division is made in the offices of the city clerk of the city, of the town clerk of the town, and of the clerk of the village, between whom such division has been made. (*Laws of 1870, ch. 311.*)

Width.—The board of supervisors may authorize the laying out of highways of a greater or less width than is now required by law, and of reducing or increasing the width of highways now in existence. (*Laws of 1875, ch. 482, § 10, as amended by Laws of 1876, ch. 257, sub. 10.*)

The power conferred is to *authorize* the acts to be done, not to adopt a resolution which shall have the effect of establishing or reducing the width of a road previously existing. (*Phillips v. Schumacher*, 10 Hun, 405.)

Extending Corporate Existence.—Section 1. Any plank road company or turnpike company, which shall have been formed under and by virtue of an act entitled : “An act to provide for the incorporation of companies to construct plank roads and of companies to construct turnpike roads,” pass* May seventh, eighteen hundred and forty-seven, and the several acts amendatory thereof, or under and by virtue of any act of the legislature of the State of New York, and which shall have managed and carried on any plank road or turnpike road, or which shall own any plank road or turnpike road that has been managed and carried on for twenty years last past, upon three miles in length thereof, or not less than one-third of the route named in their original articles of association, may, at any time within five years before the termination of its corporate existence, or of the time specified for its duration in its articles of association, continue its corporate existence for a period not exceeding thirty years, by first obtaining the consent, by resolution, of a majority of all the members of the board of supervisors of the county or counties in which any such road is located,

adopted at any regular or special meeting thereof, and by filing and recording in the office of the clerk of the county or counties in which such plank road or turnpike road is located, within one month before the expiration of the term of the corporate existence of such company, and in the office of the secretary of State, such consent, and a statement showing the actual capital expended in the construction of any such plank road or turnpike road, or the price paid on the purchase of any such road or franchise, exclusive of repairs, together with the consent in writing, from the persons owning two-thirds of the capital stock of such company, and in which shall also be stated the number of years which they shall desire such corporate existence extended, also the name of each town or ward through or into which the said road passes. Such statement shall be made by the president and treasurer of such company, and they shall annex or indorse thereon their affidavit of the above requirements.

§ 2. Section six of chapter one hundred and thirty-five, Laws of eighteen hundred and seventy-six, is hereby amended so as to read as follows :

§ 6. The provisions of this act shall apply to all the counties of this State, except the countyies* of Kings, Yates, Quenes,* Seneca and St. Lawrence. (*Laws of 1879, ch. 253*, amending laws in relation to extending existence of plank roads.)

Filing of Papers.—When the commissioners of highways have made and filed an order laying out a highway, such order is conclusive evidence of the laying out and boundaries of the road. If any substantial error has been committed, it must be corrected on appeal or certiorari. (*Mogg. Comr. v. West, N. Y. Ct. of Appeals, Jan., 1879.*)

CHAPTER IV.

ALTERING AND DISCONTINUING HIGHWAYS.

A highway running obliquely across the farm of a petitioner, near its terminus in another highway, was changed by the commissioners so as to run on the line of the lots and enter the highway at right angles, held, an alteration, not a new road. (*People v. Jones*, 63 N. Y. R. 306.)

Widening Highway.—The widening of a highway is an alteration of it. It is not the “laying out” of a new highway. (*People v. McNeil*, 2 N. Y. Sup. 140.)

Discontinuing Highways.—Upon application being made according to law to the commissioners of highways of any town, for the discontinuance of any public highway therein, it shall be the duty of such commissioners to give to all owners and occupants residing upon lands through or along which the highway described in said application passes, six days’ notice, in writing, of the time and place of the meeting of the jury of freeholders to certify to the uselessness of said highway, which notice shall contain the name of the applicant and a brief description of the highway described in the application. And in case such jury shall certify that said highway is useless and unnecessary, then it shall be the duty of such commissioners to give to such owners and occupants six days’ notice, in writing, of the time and place of the meeting of

such commissioners to hear and determine such application. The notices required by this act shall be served by delivering the same to such owner or occupant, or, if he be absent, by leaving them at his dwelling-house, and in either case at least six days before the time of meeting of which notice is given. (*Laws of 1873, ch. 69, as amended; Laws of 1878, ch. 114.*)

Commissioners having *all* met may depute *one* of their number to make the alteration considered. (*Smith v. Homer, 7 Barb. 416.*)

A certificate of freeholders is not necessary where the owner consents and files with the town clerk a release of damages. (*People v. Jones, 63 N. Y., 306.*)

Where a new road has been regularly laid out, it cannot be discontinued as an old one, before it has been opened and used. (*People v. Griswold, 67 N. Y. R. 59.*)

Discontinuance by non user.— Any plank road corporation which, for a period of five consecutive years, shall have heretofore neglected or omitted to exercise its corporate functions shall be deemed dissolved, and, provided its road bed or right of way shall have been used as a public highway for the said five years, the same shall be deemed, and be a public highway to all intents and purposes, and with the same effect as if laid out by the commissioners of highways of towns under the statute, and all laws relating to the erection, repairing and preservation of bridges shall apply to such highway. (*Laws 1872, ch. 780.*)

The right of eminent domain, in this state, does not authorize the taking of property belonging to the public as a highway, and donating it to an individual. (*People v. Comr's of Palatine, 53 Barb. 70.*)

Where an adjacent owner makes substantial improvements upon the portion of a street abandoned by action of the city, the city is estopped from setting up a claim thereto. (*St. Vincent Female Orphan Asylum v. City of Troy*, 12 Hun, 317.)

Abandonment of a highway can only be predicated upon the act of those entitled to easement. On a public highway the public alone can work an abandonment by acts of obstruction. (*Armsby v. Hends*, 46 Barb. 622.)

Any portion of a road may be discontinued without affecting the residue. The refusal of the referee to discontinue is no bar to new proceedings within four years for that purpose. (*People v. Nichols*, 51 N. Y. R. 470, also *People v. Jones*, 63 N. Y. R. 306.)

By chap. 855, of the Laws of 1869, secs. 2 and 3, the boards of supervisors of each county, excepting New York and Kings, have power to provide for the use of abandoned turnpike, plank or macadamized roads, within any town as public highways. Also to change the rates of toll upon plank and turnpike roads, and upon ferries and bridges.

Damages, how to be assessed.— Whenever any damages are now allowed to be assessed by law, when any road or highway shall be laid out, altered or discontinued, in whole or in part, such damages shall be assessed by not less than three commissioners to be appointed by the county court of the county in which such road shall be, on the application of the commissioner or commissioners of highways of the town; or in case the said commissioners of highways should neglect or refuse to make

such application for the space of thirty days after having been requested so to do, it shall be lawful for the said county court to appoint such commissioners on the application of any of the owners of the land through which such road shall have been laid out; and the commissioners so appointed shall take the oath of office prescribed by the constitution, and shall proceed, on receiving at least six days notice of the time and place, to meet the commissioners of highways, and take a view of the premises, hear the parties and such witnesses as may be offered before them; and they shall all meet and act, and shall assess all damages which may be required to be assessed for the said highway, and shall be authorized to administer oaths to witnesses who may be produced before them under this section; and when they shall all have met and acted, the assessment agreed to by a majority of them shall be valid; and when such assessment shall be so made, it shall be delivered to one of the commissioners of highways of the town, who, within ten days after receiving the same, shall file it in the town clerk's office in the said town. *Laws of 1872, ch. 315.*

The word "owner" means the person entitled to the legal estate in the land, e.g. where there is an executory contract for sale of land, it is the consent of the vendor. (*Smith v. Ferris, 6 Hun 553.*)

Consideration that business of turnpike would be diminished by the construction of railroad along same general line of travel should be disregarded. (*Matter of Hamilton ave., 14 Barb. 405; Troy & Boston R. R. Co. v. Northern Turnpike, 16 id. 100.*)

But where the railroad invades and takes the land of

turnpike, the latter is entitled to damages. (*Matter of Flatbush ave.*, 1 *Barb.* 286.)

Action will not lie to restrain the erection for public purposes, by a city of a bridge upon one of the streets thereof, at the suit of a land owner whose property is not taken or touched. (*Swett v. City of Troy*, 62 *Barb.*, 630.)

Notice of appeal from assessment must be served on *all* of the commissioners. (*The People v. Mitchell*, 54 *Barb.*, 589).

Effect of filing.—The power of the commissioners to assess was expended when they sign a determination and deliver it to one of the commissioners who files it with the town clerk. They cannot review their action. (*People v. Mann*, 5 *N. Y. Sup. R.* 207.)

Re-assessment.—Application for a re-assessment of damages is not an appeal in any sense, but a reargument. (*People v. White*, 59 *Barb.* 666.)

Jurors.—The act of 1845, ch. 181, as amended Laws 1847, ch. 455, in regard to a reassessment by a jury, is not in conflict with Art. 1 § 7, of the Constitution.

The claimant is entitled to the amount found by the jury. (*Clark v. Muller*, 42 *Barb.*, 255; *id.* 47 *Barb.*, 38.)

Commissioners of highways, who have paid the jurors fees, and other costs of a reassessment of the damages of a land owner, caused by laying out a road through his land, upon an appeal by them from original assessment, upon which appeal the amount is reduced,

can maintain an action to recover such costs of the land owner. (*Cary v. Marston*, 56 *Barb.* 27).

Damages assessed to be audited by Supervisors.—A claim presented to a board of supervisors, who permitted their session to expire without taking any action upon it, is to be regarded as rejected, for the purpose of a mandamus to compel its allowance. (*People v. Supervisors of Richmond Co.*, 20 *N. Y.*, 252.)

Appeals from the Commissioners.—An appeal does not lie to the court of appeals, from a judgment of the general term, affirming a decision of a county judge, in relation to taxation of a plank road company. (*People v. Freeman*, 52 *N. Y. R.*, 656.)

Where the county judge cannot act, an order made by him designating a justice to act in his stead, is annullity. (*People v. Comrs. of Greenburgh*, 57 *N. Y. R.* 549.)

No notice of the time and place of hearing an appeal from the determination of the commissioners, is required to be given to the owner or occupant of the lands taken. (*People v. Burton*, 65 *N. Y. R.* 452.)

Powers and Duties of Referees.—The referee can only consider the ground specified in the appeal. (*Rector v. Clark*, 12 *Hun*, 139.)

Referees have no power to pass upon the question of the jurisdiction of the commissioner to make the order. (*People v. Harris*, 63 *N. Y. R.* 391.)

Neither have they the power to review the proceedings before the jury of freeholders who made the certificate. Their authority is confined to the necessity and propriety of laying out the road. (*People v. Kniskern*,

54 N. Y. R. 52; *People v. Van Alstyne*, 3 Abb. Ct. of Ap. Dec.)

An order on appeal, that the road be laid out as applied for, is a sufficient direction to the commissioners, to lay it out. (*People v. Com. of Salem*, 1 Cowen, 23.)

Costs.—On an appeal to the supreme court from an order of referees made on reviewing an order of the commissioners, touching the laying out of the highway, no costs are allowed. (*People v. Heath*, 20 How. Pr. 304.)

Where the supreme court reverses the decision of the county judge and referees, without any directions as to costs, and judgment was entered *with costs—held irregular and unauthorized.* (*People v. Robinson, et al.*, 25 How. Pr. R. 345.)

There may be cases where costs are proper. (*Id.*)

Notice of Decision.—Where the referees had given notice of the hearing of the appeal, and having heard the parties thereon, reversed the order of the commissioner refusing to lay out, a second notice *must be* given to owners. (*People v. Kniskern*, 54 N. Y. R., 52, rev'g 50 Barb. 87.)

It is not necessary to the validity of an order of referees, affirming a decision of commissioners laying out a highway, that it should show that *all* of the referees met to deliberate, or were notified, and such an order is valid though signed by only two of the referees. (*People v. Burton et al.*, 65 N. Y. R. 452.)

Effect of Decision.—A reversal of proceedings of commissioner is to render them void from the beginning. (*Briggs v. Bowen*, 60 N. Y. R. 454.)

Who may have a Certiorari.—A party ought not to lie by and impose upon the town the expense of appearing, assessing, etc., and collecting damages, and then bring a certiorari to annul the proceeding. He must be prompt. (*People v. Landreth*, 4 N. Y. Sup. 134.)

A writ of certiorari will not be sustained where the only interest claimed by the party is that his business as an innkeeper will be injured by the highway to be laid out. (*People v. Schell*, 5 *Lansing*, 352.)

A certiorari is not proper while an appeal is pending to the county judge from the decision of the commissioners. (*People v. Wallace*, 4 N. Y. Sup. 438.)

Confirmation of a report of commissioners for opening a street, cannot be disturbed except for fraud. (*Matter of Lexington Ave.*, 5 N. Y. Sup. Ct. 436.)

CHAPTER V.

OBSTRUCTIONS AND ENCROACHMENTS.

What Obstructions are Allowable.—A work of art, such as an ornamental statue, may be erected in a highway when it does not obstruct travel. (*Tompkins v. Hodgson*, 2 *Hun*, 146.)

Slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal, because the public may not, for the time, have the full use thereof. *e. g.*, an elevator unloading a vessel into a canal boat, (*People v. Horton*, 64 *N. Y. R.*, 610.)

Obstruction of its street by a municipal corporation entitles its owners to damages. (*St. John v. Mayor of New York*, 3 *Bow.* 483.)

Permission to make an obstruction by an owner of the easement, works an extinguishment thereof. (*Cartwright v. Maplesden*, 53 *N. Y. R.* 622.)

Nuisance.—A party who continues a nuisance erected by another is responsible for damages. (*Brown v. Cayuga & S. R. R. Co.*, 12 *N. Y. R.* 486.)

Each injury caused by continuance of nuisance is a new cause of action. (*Vedder v. Vedder*, 1 *Denio*, 258.)

WHAT ARE NOT ALLOWABLE.

Processions.—By Laws of 1872, *ch.* 590, no procession or parade is to interfere with the free passage of cars on railways. In crossing a road the procession must halt and allow cars to proceed.

All processions or parades are forbidden to occupy the street to the exclusion of other citizens, unless six hours notice has been given to the police, who may lay out the line of march, and the width of the column. The national guard and police and fire departments are excepted. Parades are forbidden on Sunday, excepting funeral processions, in the course of which there shall be no music, fireworks, discharge of cannon or firearms, or other disturbing noise, provided that in any military funeral, music may be played while escorting the body, but not within one block of a place of worship, where worship is being celebrated.

The penalty is twenty dollars or an imprisonment of ten days.

Rafts.—Rafts continuously moored are an encroachment on a public highway. (*Moore v. Jackson*, 2 *Abb. N. C.* 211.)

Fences.—In every case where a highway shall have been laid out or ascertained, described and entered of record in the town clerk's office, and all roads not recorded, which have been or shall have been used as public highways for twenty years or more, and the same have been or shall be obstructed in any manner or encroached upon by fences or otherwise, the commissioner

M. C. C. A. C. H.

or commissioners of highways of the town shall, if in his or their opinion it be deemed necessary, order such obstructions or encroachments to be removed, so that such highway may be of breadth originally intended. The commissioner or commissioners making the order shall cause the same to be reduced to writing and signed, and shall also give notice in writing to the occupant or owner of the land to remove such obstructions or encroachments within sixty days. Every such order and notice shall specify the breadth of the road originally intended, the extent of the obstruction or encroachment, and the place or places where the same shall be. (1 R. S. chap. 16, art. 5 §103 of title 1 as amended by Laws of 1878, ch. 245, §103.)

Service of Notice.—Where a statute prescribes a notice as a precedent to doing an act, and does not prescribe the mode of giving it, personal service is necessary. (*McDermott v. Board of Police*, 5 Abb. Pr. 422. *Rathbun v. Acker*, 18 Barb. 393.)

Penalty.—If such removal shall not be made within the time above mentioned, the said commissioner or commissioners may summarily remove, or cause to be removed, such obstructions or encroachments, and the owner or occupant of the premises to whom the notice shall be given, shall pay to such commissioner or commissioners all reasonable charges therefor, and shall forfeit the sum of fifty cents for each day that such obstruction or encroachment shall remain unremoved after the expiration of the time mentioned in said notice, which shall be collected by suit in justice's court, and shall be applied to the improvement of the roads and

bridges of said town. (1 R. S. 522, §104, *as amended, Laws of 1878, ch. 245.*)

Weeds.— By Laws of 1878, chapter 49, §1, it shall be the duty of every person or corporation, owning or occupying under a lease of one or more years, any cultivated or enclosed lands abutting upon any highway, to cause all noxious weeds, briars and brush, growing upon said lands, within the bounds of said highway, to be cut or destroyed between the fifteenth day of June, and the first day of July, and between the fifteenth day of August, and the first day of September, in each and every year. But boards of supervisors may fix a different period, or periods, for such cutting or destruction in their respective counties. This section shall not be construed to restrict any of the powers heretofore conferred upon boards of supervisors.

§2. It shall be unlawful for any person to place or cause to be placed any noxious weeds, or the seeds of such weeds within the bounds of any public highway.

§3. Any willful neglect or refusal to comply with the provisions of section one of this act, or any willful violation of section two of this act, shall subject the person or corporation so offending to a penalty of ten dollars and costs in and for each road district in which any of such provisions shall be violated, to be sued for by the commissioner or commissioners of highways of the town wherein said road districts shall be situate, or by the street commissioner of villages, when such village constitutes a separate road district, and recovered before any justice of the peace having jurisdiction ; said fine, when collected, to be paid into the highway fund of such town or village.

§4. It shall be the duty of commissioners of highways

of towns or street commissioner of villages to prosecute every person or corporation violating any of the provisions of this act in their respective towns or villages, and to include in each annual report of such commissioners a detailed statement of all fines recovered under the provisions of this act.

Remedy by indictment.—The commissioner of highways have no power to bring an action to enjoin the construction of a permanent obstruction in the highway. (*Coykendall v. Durkee*, 13 Hun, 260.)

The commissioners of highways of two towns, cannot unite and bring an action for an encroachment on a highway forming the town line. (*Bradley v. Blair*, 17 Barb. 480.)

Bridges, Liability of Commissioners.—A commissioner who undertakes to build a bridge is liable for negligence in its construction, to one injured although sufficient funds had not been put in his hands for the purpose of building. (*Rector v. Pierce*, 3 N. Y. Sup. 416, *Day v. Crossman*, 4 N. Y. Sup. 122.)

A suit for injuries will lie against the commissioners for injuries caused by their neglect to keep the highways and bridges in a proper state of repair, they having the funds on hand. (*Hover v. Barkhoff*, 44 N. Y. R. 113.)

Commissioners are not liable for an injury not proximate upon neglect to repair. (*Day v. Crossman*, 4 N. Y. Sup. 122.)

By Laws 1875, ch. 482, §1 sub. 3, the supervisors, except in cities whose boundaries are the same as those of the county, have power.

To authorize the location, change of location, and

construction of any bridge (except on the Hudson river below Waterford, and on the East river, or over the waters forming the boundaries of the State), which shall be applied for by any town or towns jointly, or by any corporation formed pursuant to the general laws of the State, or by any corporation or individual for private purposes ; and in the case of a public bridge erected by a corporation, to establish the rates of toll to be collected for crossing such bridge. But in every case where any such bridge is to cross a navigable stream of water, full provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw to prevent any impeding of the navigation of such stream or water, and in case of a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. Where any bridge shall be on a stream of water forming at the point of crossing the dividing line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction permitted by this subdivision.

By Laws of 1878, chap. 77, section four of the foregoing, was amended as follows :

To apportion as such board may deem equitable the expense of the construction of any public bridge (except on the Hudson river below Waterford, and on the East river, or over the waters forming the boundaries of the State), over a stream or other water forming the boundary line of counties between the towns at such point. Where the board of supervisors shall deem that the construction of such bridge is a general benefit to the county, they shall determine what proportion of the expense thereof should be borne by the respective counties, or by the respective towns of such counties and to authorize

any town on the vote of the majority of the electors voting at any annual town meeting or regular called special town meeting, to appropriate such a sum to be raised as other bridge moneys are raised, to aid in the construction and maintenance of any bridge outside the boundaries of the town or county, but forming a continuation of highways leading from such town or county, and deemed necessary for the public convenience.

Section 5 of the Laws of 1876, chapter 257, confers powers on the supervisors to provide for the care of bridges crossing a stream which forms the county line.

Notice on Bridge.—The commissioners of highways of each town may put up and maintain in conspicuous places, at each end of any bridge in such town, maintained at public charge, the length of whose chord is not less than twenty-five feet, a notice, with the following words in large characters: “One dollar fine for riding or driving on this bridge faster than a walk.” And when the length of said chord is over fifty feet and not over one hundred feet, the following notice: “Five dollars fine for riding or driving on this bridge faster than a walk.” And when the length of said chord is over one hundred feet and not over two hundred feet, the following notice: “Ten dollars fine for riding or driving on this bridge faster than a walk.” And when the length of said chord is over two hundred feet, the following notice: “Twenty-five dollars fine for riding or driving on this bridge faster than a walk.”

Whoever shall ride or drive faster than a walk on any bridge in this State, upon which such notices shall have been placed, and shall then be, shall forfeit for every offense the sum specified in said notice. (1 R.S. 525, § 122 and § 123, as amended by Laws of 1875, ch. 22.)

When two or more towns are required to build and maintain a bridge, such bridge should be built and maintained at their joint expense, without reference to the town lines. (*Lapham v. Rice*, 55 N. Y. R., 472.)

The proceedings authorized by the Laws of 1857, chapter 639, to compel the repair of bridges can only be instituted in the cases of bridges over streams dividing towns. (*Matter of Petition, &c.*, 59 N. Y. R. 316.)

The act of 1857 (chapter 639), confers no authority as to bridges over bays, lakes or other bodies of water, not streams, or as to causeways or bridges over marshes between two towns. (*Matter of Irondequoit and Penfield*, 68 N. Y. R. 376.)

Railroads in Highways and Streets.—Where a railroad corporation is authorized to appropriate lands only for its own use, for the purposes contemplated by its charter, it is not lawful to add to such use that for street and highway purposes, unless additional compensation is made to the owner of the fee. (*Strong v. City of Brooklyn*, 68 N. Y. R. 1.)

The use of a street as a railroad is a new burden beyond the public easement, which cannot be imposed by the legislature without compensation to the owner. (*Matter of Petition of N. Y. C. & H. R. R. Co., N. York Weekly Digest*, 171.)

The right of a railroad company to lay its tracks in the street carries with it the obligation to lay them in a proper manner and to keep them in repair; and if an injury occurs it is liable. (*Worster v. Forty-second St. R. R. Co.* 50 N. Y. R. 203.)

A reservation of power to revoke the license, on the part of the city, does not affect the liability of the road. (*Mayor of Troy v. T. & L. R. R.*, 49 N. Y. R., 657.)

In an action for injury to passer by from defect in street, notice is not necessary if defect was visible. (*Rockwell v. 3d Ave.*, 64 Barb., 438.)

In the city of New York, the abutting owners have no fee in the street, except an easement to pass and repass, hence an action will not lie for the inconvenience caused by a track laid in too close proximity to his sidewalk. (*Kellinger v. Forty-Second St. R. R.*, 50 N. Y. R. 206.)

Nor is he entitled to an injunction against an elevated railway authorized by the legislature, because of failure to make compensation for impairing his easement. (*Story v. N. Y. Elevated R. R. Co.*, 3 Abb. N. C. 478, *see Elevated R. R. Cases*, 3 Abb. N. C. 301.)

The possession of a highway by a railroad company, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil. (*Broistedt v. South Side R. R. Co.*, 55 N. Y. R., 220.)

Right of Public to travel with Wagons, etc., on Street

• *Railways*.—The turning to the *left* in meeting a street car on the track, does not in itself constitute negligence. But other carriages must keep out of the way of the cars and if by their own negligence they are injured, an action will not lie. (*Hegan v. Eighth ave. R. R. Co.*, 15 N. Y. R., 380.)

A street railway company is not liable for the willful act of one of its employes. (*Whittaker v. The Eighth ave. R. R.*, 51 N. Y. R., 295.)

CHAPTER VI.

SIDEWALKS.

By Laws of 1860 ch. 61, as amended by Laws of 1876, ch. 340, it shall be lawful for any person owning or occupying lands adjoining a highway, road or lane, to construct a sidewalk within said highway, road or lane, along the line of such lands or the lands of others, with the consent of such other owner or owners, and when a sidewalk shall be or has been so constructed, every person or persons who shall ride, drive, or lead a horse or team upon any such sidewalk, except for the purposes of crossing the same, shall forfeit not less than two nor more than five dollars for each offense, in the discretion of the court, one-half for the use of the complainant and the other half to the overseer of the road district, to be expended in the improvement of sidewalks therein, to be recovered in any court having cognizance thereof, with costs of suit.

Whenever any owner or occupant of any such land shall refuse or neglect to prosecute for the forfeiture incurred by such trespass, it shall be lawful for any other party or person interested, or who shall reside in the said district in which the sidewalk is constructed, to prosecute in his own name the person or persons so incurring such forfeiture, the proceeds of which shall go, one-half to the prosecutor for his trouble and expense, and the other half for the improvement of sidewalks, as in section first.

Shade Trees.—All persons owning lands fronting upon any highway (except in cities and incorporated villages), may make and have sidewalks along such land in the highway, and may plant and have shade trees along the road side of such sidewalks; such sidewalks, with shade trees, shall not extend more than six feet in width from the outward line of such highway to the line of the center of such shade trees; provided such highway is not more than three rods wide. In all cases where the highway is more than three rods wide the central line of such shade trees may be extended into the highway, from its outward line, a distance equal to one-fifth part of the width of such highway; provided such central line shall in no case exceed eleven feet from the said outward line of such highway; and for the protection of such walks or trees they may also construct a railing of one bar, of not more than three and a half feet in height, with posts and with openings at convenient distances, so as in nowise to prevent foot passengers from using such walks, upon the road sides adjacent and within two and a half feet of such trees, or, if there are no trees, then upon the road side of such sidewalks, on the same line on which trees may be planted as herein above provided.

But no trees of the kinds named in chapter three hundred and twenty-two of the Laws of eighteen hundred and sixty-nine, shall be planted nearer together than is therein provided. (*Laws of 1874, ch. 570.*)

By the second section of the above act it is made a misdemeanor, subject to a fine of fifty dollars or imprisonment of thirty days, to injure in any way the trees so planted.

The act of 1863 (chapter 93), authorizing the making

of sidewalks and planting shade trees along highways, etc., is not repugnant to, and does not repeal the act of 1860, chapter 61. (*Anderson v. Van Tassel*, 53 N. Y. R. 631.)

By Laws of 1875, chapter 215, it is unlawful for any person or persons whatsoever in this State, to hitch any horse or other animal to, or leave the same standing near enough to, to injure any fruit or forest tree that has been transplanted or used as a shade or ornamental tree around any schoolhouse, church or public building or along any public highway.

§ 2. Any person or persons guilty of violating the provisions of section 1 of this act, shall be liable to prosecution by any person, before any justice of the peace in the town where the offense is committed, and punishable by a fine not exceeding ten dollars nor less than one dollar, besides the costs of the action; and every such penalty when collected shall be paid, by the justice, one half to the overseer of the poor of the town in which recovery was had, and the remainder to complainant; and the same process and means for the collection of the penalties imposed by this act may be issued and had as are now allowed by law for the collection of damages in actions of tort, but no provision of this act shall operate to interfere with any ordinance of the incorporated villages and cities of this State intended to secure the protection of shade trees therein.

Duty of Corporation to Repair.—A person who interferes with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, irrespective of any permission from the authorities. (*Sexton v. Zett*, 44 N. Y. 430; but see 66 N. Y. R. 334; *Irwin v. Wood*, 4 Rob. 138; 5 *id.* 482.)

A cover to a coal hole in the sidewalk is a part of the highway, and must be kept as secure as the sidewalk itself. (*Whalen v. Gloucester*, 4 *Hun*, 24, and cases there cited.)

Liability of a corporation does not depend on whether it has funds in its treasury to pay for the same, but upon the question whether or not it has the power to raise funds to defray such expenses. (*Peach v. City of Utica*, 10 *Hun*, 477; *Weed v. Village of Ballston Spa*, *Ct. of Appeals*, March 18, 1879.)

As to whether a city is liable for a runaway horse striking a hydrant nozzle projecting four inches from the gutter. (See *Ring v. City of Cohoes*, *N. Y. Ct. of Appeals*, April 15, 1879.)

Where the charter of a municipal corporation authorized it to repair the streets and sidewalks thereof and to collect the amount by assessment, it may cause repairs to be made to a sidewalk along and upon land owned by a turnpike road within the limits of the city, and may assess the expense thereof upon the owners of the lands abutting thereon. (*Elmendorf v. City of Albany*, 17 *Hun*, 81.)

Where a village was held liable for negligence in allowing a sidewalk to be out of repair, held that, in the absence of statute or contract, no right of action to indemnify the village lay against the owner of adjoining lands. (*Village of Fulton v. Tucker*, 5 *N. Y. Sup.* 621.)

Ice and Snow on Walk.—A municipal corporation is bound to keep and maintain the streets and sidewalks

in safe condition for use, in the usual mode, and is liable for any injuries to individuals resulting therefrom. (*Clemence v. City of Auburn*, 66 N. Y. R. 334, and cases cited.)

The mere fact that there is ice upon a city sidewalk does not necessarily establish that it is dangerous ; a person having knowledge of the fact is simply bound to exercise such care and caution as a person of ordinary prudence would exercise. (*Evans v. City of Utica*, 69 N. Y. R. 166.)

An injunction lies at the suit of an abutting house owner, to enjoin a street railroad company from leaving the snow, which it removes from its tracks, heaped up between their and plaintiff's premises for a longer period than reasonably requisite for taking it away. (*Prime v. Twenty-third St. R. R.* 1 Abb. N. C. 63.)

Law of the Road.—An injured party cannot maintain an action when his own negligence contributed to the injury. (*Welling v. Judge*, 40 Barb. 193.)

Travelers on Foot.—A foot passenger has no priority of right over vehicles in the streets of the city of New York, and the former must act with prudence. (*Belton v. Baxter, et al.*, 54 N. Y. R. 245; *Barker v. Savage, et al.*, 45 N. Y. R. 191.)

They have equal rights. (*Brooks v. Sechwerin*, 54 N. Y. R., 343.)

The citizen must yield the right of way at railroad crossings. (*Warner v. N. Y. C. R. R. Co.*, 44 N. Y. R. 465.)

The conductor of a street car is not a driver of a carriage within the meaning of section 6, 1 R. S., 696, and therefore the company is not liable for his willful act. (*Isaacs v. Third ave. R. R.*, 47 N. Y. R., 122.)

Cattle in Highways.—By Laws of 1872, ch. 776, amending laws of 1862, 1867 and 1869, it shall not be lawful for any cattle, horses, sheep, swine or goats to run at large or to be herded or pastured, in any public street, park, place or highway in this State, and it shall be the duty of every overseer of highways within his road district, and of every street commissioner in any incorporated village, who shall have personal knowledge, or who shall be notified of any violation of this act, to seize and to take into his possession, and to keep until disposed of according to law, any animal so found running at large or being herded or pastured, and any person suffering or permitting any animal to so run at large, or be herded or pastured in violation of this section, shall forfeit a penalty of five dollars for every horse, swine or cattle, and one dollar for every sheep or goat so found, to be recovered by civil action, by any inhabitant of the town in his own name, or in the name of the overseer of the poor of the town, or the proceedings hereinafter provided.

The statute of 1862, ch. 452, as amended in 1867, 814 §2, which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon the premises from the highway; it has no application to the case of a trespass by the cattle of one gaining access through a division fence to the lands of an adjoining owner. (*Jones v. Sheldon*, 50 N. Y. R., 477.)

The seizure of animals at large in public highways, under this act, is constitutional. (*Campbell v. Evans*, 54 *Barb.*, 566.)

It is no defence to an action for the penalty under this act, that the cattle had escaped by the breaking down of fences by an unruly cow, or by reason of defective fences. (*Cotton v. Maurer*, 1 *N. Y. Sup.* 481.)

It is unlawful to allow horses to run at large, in the highway. (*Power v. Burlew*, 3 *N. Y. Sup.* 362.)

Summons.—Irregularity of the summons issued by the justice, or omission to post it, does not affect the right of one who has seized cattle trespassing, to hold them.

The justice has a lien on the cattle for payment of the fine. (*Leavitt v. Thompson*, 52 *N. Y. R.* 62.)

Penalties may be recovered, for cattle running at large, more than one year after the offense. (*Cotton v. Maurer*, 5 *N. Y. Sup.* 575.)

Menageries.—By the Laws of 1862, chapter 112, it shall not be lawful for any owner or owners of any wild or rare animal, native or imported, which shall be used for exhibition in any menagerie or show, or owned or possessed for the purpose of so exhibiting the same, to convey or cause to be conveyed, or led or driven, over, through or upon any public highway, road or street, such wild or rare animal, unless such owner or owners shall send before the same a person of mature age, at least one-half of a mile in advance, to notify and warn persons traveling or using said highway, road or street,

with horses or other domestic animals liable to be frightened by such wild or rare animal, of the approach of such animal. Any such owner using any public highway, road or street, in violation of the provisions of this act, shall be deemed guilty of a misdemeanor, and may be punished, on conviction, by fine, not exceeding one hundred dollars, or by imprisonment in a county jail not exceeding ninety days, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

Ways and Private Roads.—The consent of the persons, over whose lands the proposed private road is to be laid, must be obtained before laying out the road. (*Dempsey v. Kipp*, 62 *Barb.* 311.)

Parties who agree upon the jurors, cannot, upon appeal, object that it does not appear that such jurors were freeholders. (*People v. Taylor*, 34 *Barb.* 481.)

Plank Roads and Turnpikes.—An agreement granting to a turnpike company the use of a highway forever, is not void for excess of authority. (*Town of Fishkill v. Fishkill & B. Turnpike Co.*, 22 *Barb.* 634.)

The legislature may revoke the excess of authority with consent of other party. (*People v. Fishkill & B. Turnpike Co.*, 27 *Barb.* 445.)

By Laws of 1879, chapter 214, section 1, any plank-road or turnpike company shall have power and is authorized to lay iron rails on their road suitable for the use of wagons and vehicles drawn by horses going over its road, except in the counties of Cortland, Orleans, Kings, Oneida, New York and Steuben.

§ 2. Nothing contained in this act shall permit or authorize the using of steam on any plank road or turnpike.

Inspectors of Plank Roads.—By Laws of 1872, chapter 779, the commissioners were to act as inspectors of plank roads, on complaint of three freeholders, but by the Laws of 1873, chapter 440, as amended by the Laws of 1877, chapter 164, it is made the duty of said officers to personally inspect the whole of such plank or turnpike roads, or such part thereof as lie in their respective towns, villages or cities, at least once in each month ; and in case the same shall be out of repair or in such condition that the same cannot be conveniently used by the public, to give notice in writing thereof, immediately to the toll gatherer, or person attending the gate nearest to each place out of repair or in bad condition, to cause such road to be put in good condition within forty-eight hours from the service of such notice, or in default thereof, to order the toll gate or gates upon said road to be immediately thrown open ; and such gate or gates shall not be closed until such road shall be fully repaired, or be in proper condition, to the satisfaction of said officers or a majority thereof. The notice to said toll gatherer shall point out the part of such road to which the said officers shall object. The fees of each of said officers for the services in this section mentioned shall be two dollars for each day actually employed in such service, to be paid by the corporation or persons whose road shall be so inspected by said officers, in case they shall order said toll gate or gates to be thrown open ; but otherwise, to be charged, audited and paid in the same manner as the other fees and expenses of commissioners of highways. Any party feeling himself

aggrieved by the order of said plank road inspectors may appeal therefrom to the county court of the county in which the part of the road embraced in said order is situated ; said appeal to be brought within twenty days after the service of said order. The notice of appeal shall be served upon one of said inspectors, and a copy thereof shall be filed in the county clerk's office. The appeal may be brought on to hearing upon a notice of not less than five days, and the county court shall always be open for the purpose of hearing and determining such appeal. The said court shall proceed to hear said appeal, and after hearing the proofs and allegations of the parties, may affirm, reverse or modify said order. During the pendency of such appeal said toll gate or gates shall remain open.

This act does not apply to Clinton, Chenango, Seneca, Queens, Orange, Essex, Cayuga, Madison and Steuben counties (*Laws of 1874, ch. 224*), or Montgomery (*Laws 1875, ch. 530*).

Fees.—By Laws of 1873, chapter 440, section 3, when the commissioners are engaged as inspectors of plank roads or turnpikes, the fees are two dollars for each day actually employed, to be paid by the corporation or persons whose road shall be inspected, in case the toll gates are to be thrown open, but otherwise, to be charged, audited and paid the same as other fees and expenses of highway commissioners.

I N D E X.

<i>Abandoned</i> street, effect of adjacent owner's improvements upon,	41
roads, use of as public highways,	41
<i>Abandonment</i> , of public highway,.....	41
<i>Abatement of taxes</i> , for water trough,.....	27
for removing fence,.....	28
for shade trees,.....	27
<i>Action</i> , for defect in street,	55
for encroachment,.....	43
by or against commissioners,.....	20
<i>Altering</i> or discontinuing highways,.....	39
<i>Appeals</i> ,.....	44
<i>Application</i> , notice of,	31
<i>Appointment</i> of overseer,.....	20
<i>Assessment</i> of highway labor,.....	21, 22
of damages in laying out,.....	41
of railroad property,.....	22
<i>Bridges</i> , between two towns,.....	54
liability of commissioners as to,.....	9, 10, 51
money for repair of,.....	13
notice on,.....	53
power of supervisors in regard to,	50
over bays, lakes, etc.,.....	54
reported unsafe,	10
<i>Bond</i> , on application to lay out highway,.....	31
how to be disposed of,.....	18
<i>Canals</i> are highways,.....	5

<i>Cattle</i> , in highways,.....	61
trespassing,	61
<i>Cemetery</i> , is exempt from taxation,.....	24
<i>Certiorari</i> ,	46
<i>Commutation</i> , by railroad,.....	25
<i>Commissioners</i> of two towns cannot join in an action,.....	51
liability of, as to bridges,.....	51
trustees of villages are,	8
appeal from,	44
action against successor,.....	20
special,.....	20
judgment against,.....	20
<i>de facto</i> , acts of are valid,.....	9
are fence viewers,.....	9
should <i>all</i> sign order laying out highways,	29
actions by or against,.....	20
must all meet,.....	40
right to require bond from applicant,.....	31
one cannot authorize another to sign,.....	8
election of,	8
are inspectors of highway,.....	8
duties of,.....	9
<i>Costs</i> ,.....	45
<i>County judge</i> cannot appoint justice of the peace to act in his place,.....	44
<i>Corporate existence</i> , extension of,.....	57
<i>Damages</i> , how assessed,.....	41
who entitled to,.....	42
to be audited by supervisors,.....	44
<i>Decision</i> , notice, and effect of,.....	45
<i>Dedication</i> , cannot be revoked by fencing,.....	7
<i>Discontinuance</i> of part of a highway,.....	41
<i>Discontinuing</i> , highway,.....	39
by non-user,	40
<i>Duties</i> , of referee,.....	44
<i>Elevated railroad</i> ,	55

<i>Encroachment</i> , what is,.....	48
fences, when,.....	48
penalty for,.....	49
<i>Extending</i> corporate existence,.....	37
<i>Exempt</i> lands,.....	24
<i>Fee</i> in highways,.....	6
<i>Fees</i> of inspectors of plank roads,	65
<i>Fences</i> , when encroachment,.....	48
abatement of taxes for removing,.....	28
<i>Fence-viewers</i> , commissioners are,.....	9
<i>Filing</i> . of assessment, effect of,.....	43
papers,.....	31, 38
<i>Foot-passengers</i> ,.....	60
<i>Formation</i> of new road districts,..	12
<i>Garden</i> , must be cultivated as such,..	30
<i>Graveyard</i> , road cannot be laid out through,.....	31
<i>Highways</i> , changing system of working,.....	16
laid out across railroad tracks,.....	35
<i>Indictment</i> , remedy by,.....	57
<i>Inspectors</i> , commissioners are,.....	8
fees of,.....	65
of plank roads,.....	64
<i>Judgment</i> , how collected,.....	20
<i>Jury</i> , justice of peace is not required to charge,.....	35
<i>Jurors</i> ,.....	43
<i>Justice</i> , cannot act in place of judge,.....	44
power of,.....	20
<i>Labor on highways</i> ,.....	25
assessment of,.....	21
additional labor to remove snow,	22
<i>Law of the road</i> ,.....	60
<i>Laying out</i> highways,.....	28
proceedings on,.....	32
between towns,.....	35
road through orchard,.....	30
irregularity in, how cured,.....	29

<i>Laying out</i> highway across railroad tracks,.....	35
<i>Liability</i> , of city to repair streets,.....	12
of towns,.....	12
of railroad to repair street,	12
<i>Menageries</i> , must give warning,.....	62
<i>Militia</i> , exempt from highway labor,.....	12
<i>Money</i> , raising for repairing bridges,.....	13
raised for highways, to whom paid,.....	14
commissioner has no power to borrow,.....	20
supervisors have power to direct commissioners to borrow,	17
<i>Non-resident</i> taxes,.....	23
labor unpaid,.....	26
taxes, how laid out,.....	19
<i>Non-user</i> , discontinuance by,.....	40
<i>Notice</i> , of appeal must be served on all of the commis- sioners,.....	43
of application to lay out,	31
on bridge,.....	53
service of,	49
of decision,	45
<i>Nuisance</i> ,.....	47
<i>Obstructions</i> , what are allowable,.....	47
what are not allowable,.....	48
<i>Orchard</i> , laying out road through,	30
<i>Overseer</i> , appointment of,.....	20
powers of,	21
<i>Owner</i> , meaning of word,.....	42
<i>Owner of fee</i> , liability of,.....	6
<i>Penalty</i> , for encroachment,.....	49
for allowing weeds to grow,	50
<i>Performance</i> of highway labor,.....	25
<i>Petition</i> , filing of,.....	31
<i>Piers</i> , declared highways,	5
<i>Plank road</i> , or turnpike company may lay iron rails,.....	63
<i>Plank roads and turnpikes</i> ,..... ..	63

<i>Private roads</i> ,	63
<i>Processions</i> , laws regulating,	48
<i>Proceedings</i> , on laying out highways,	32
<i>Rafts</i> , continuously moored, an encroachment,	48
<i>Railroad</i> , in street,	54
elevated,	55
liability of, to repair street,	12
liability of, in crossing street,	12
may commute,	25
right of public to drive on track,	55
<i>Re-assessment</i> ,	43
<i>Referees</i> , power and duties of,	44
<i>Repair</i> of sidewalk,	58
<i>Roads</i> , in villages,	24
private,	63
<i>Road districts</i> , formation of,	13
consolidation of,	13
<i>Service</i> of notice,	49
<i>Shade trees</i> ,	57
tying horses to,	58
<i>Sidewalks</i> ,	56
repair of,	58
coal hole in,	59
<i>Snow</i> , on sidewalk,	59
additional labor to remove,	22
heaped up by street railroad,	60
<i>Streets</i> , for what purposes used,	6
action for defect in,	55
<i>Street railroad</i> ,	54
not liable for willful act of employés,	55
<i>Successor</i> , action against,	20
<i>Summons</i> , irregularity of,	62
<i>Supervisors</i> , power of,	51
<i>Survey</i> , should be incorporated in order,	29
<i>Taxes</i> , non-resident,	23
<i>Town</i> , liability of,	12, 21

<i>Track</i> , meaning of word,	35
<i>Trees</i> , abatement of tax for,.....	27
<i>Trustees</i> , of villages,.....	8
<i>Villages</i> , roads in,..	24
assessment of labor in,.....	23
consent of trustees, when necessary,.....	20
<i>Vineyard</i> , shall not be taken for highway,.....	30
<i>Water commissioners</i> ,	9
<i>Watering trough</i> , abatement of taxes for,	27
<i>Water pipes</i> , in highways,.....	6
<i>Weeds</i> , laws relating to,.....	50
<i>Widening highways</i> ,.....	37, 39
<i>Working highways</i> , changing system of,.....	16

